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15
16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

18 TIMOTHY MILLAR and MARCO
19 MARTINEZ, each individually and on
20 behalf of all others similarly situated,

21 Plaintiffs,

22 vs.

23 EXPRESS TECHNOLOGIES, LTD.,
24 Defendant.

Case No.: 8:25-cv-01273-FWS-DFM

**DEFENDANT’S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS THE FAC AND, IN THE
ALTERNATIVE, TO COMPEL
ARBITRATION**

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

Express Technologies Ltd.’s (“ExpressVPN”) Motion to Dismiss (“MTD”) demonstrated several independent defects in plaintiffs’ First Amended Complaint (“FAC”) warranting dismissal. Plaintiffs’ Opposition fails to overcome those numerous and fundamental deficiencies and therefore only confirms the MTD should be granted in its entirety.

The Opposition’s arguments regarding personal jurisdiction fall flat because plaintiffs cannot show, as required by *Calder*, that ExpressVPN’s global advertising, maintenance of VPN Servers around the world (including in California), or third-party affiliate marketing constitutes the “purposeful direction” of wrongful conduct at California. Plaintiffs’ claim rest instead upon a static checkout page available to users worldwide, not any conduct targeted at California.

Plaintiffs also lack statutory standing for their UCL, FAL, and CLRA claims because there is no dispute they received the full value of the service they paid for, and their arguments about (at most) alleged technical defects in ExpressVPN’s autorenewal disclosures fail to establish a cognizable “loss of money or property,” especially considering that the checkout page they reference in the FAC contains repeated and conspicuous disclosures that the service would autorenew.

Plaintiffs’ also fail to establish equitable jurisdiction, acknowledging they seek restitution for the exact same damages available through their legal remedies.

Finally, even if plaintiffs could satisfy all jurisdictional requirements and state a claim upon which relief may be granted—which they cannot—any claims by Millar must be decided in arbitration. Millar cannot escape the unambiguous arbitration agreement he consented to: He was presented with clear and conspicuous notice of ExpressVPN’s Terms of Service (“TOS”) immediately adjacent to the “Join Now” button, which he clicked, demonstrating his assent. The TOS, which incorporate the ICDR rules, delegate the question of arbitrability itself to the arbitrator, and plaintiffs’

1 subsequent arguments about the agreement’s validity are misplaced, particularly their
2 fee arguments which ignore the mandatory, consumer-friendly AAA rules that apply.

3 For all these reasons and those set forth in the MTD, the FAC must be
4 dismissed, or, in the alternative, Millar’s claims must be compelled to arbitration.

5 **I. PLAINTIFFS FAIL TO PROVE PERSONAL JURISDICTION**

6 **A. Plaintiffs Fail to Establish “Purposeful Direction”**

7 Plaintiffs acknowledge that they must satisfy the *Calder* effects test by
8 demonstrating ExpressVPN “purposefully direct[ed]” relevant conduct at California.
9 Opp. 1-2. None of plaintiffs’ so-called “three buckets of intentional acts” satisfy this
10 standard.

11 **1. ExpressVPN’s Advertisements**

12 ExpressVPN demonstrated that, considered in context, the ads at issue
13 conveyed that consumers located anywhere in the world *outside* California could
14 remotely access ExpressVPN Servers located *inside* California, just as they can
15 remotely access numerous other servers located around the world. Indeed, that is a
16 critical feature of VPN services—enabling users to maintain privacy and appear to be
17 located somewhere they are not. MTD at 10-11. ExpressVPN’s marketing of
18 California IP addresses to its global customer base does not constitute “purposeful
19 direction” toward the California market.

20 Taken together, plaintiffs’ contentions set out that ExpressVPN’s audience, by
21 virtue of being global, also includes consumers located in California—who are
22 equally free to select VPN Servers located in California (or another location). That
23 may be, but any such contacts were at best “incidental” to ExpressVPN’s efforts to
24 serve a national and global market and therefore cannot give rise to personal
25 jurisdiction. *See Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1147 (9th Cir. 2017).
26 For example, whereas plaintiffs assert ExpressVPN “recommend[ed] that California
27 customers use . . . servers” located in California, Opp. at 3 (citing FAC ¶ 15), the ad
28 itself says no such thing. It says only that, “For best results, choose the server closest

1 to your actual geographic location.” MTD at 11. This language provides no
2 recommendations specific to California consumers; nor does it even recommend the
3 use of California VPN servers specifically. It recommends that any ExpressVPN
4 users select the server closest to their location, wherever they are. For California
5 residents, that would sometimes be a server located in California, but not necessarily
6 and not always.¹

7 Plaintiffs also point out that the advertisements contain language like “Best
8 VPN for California,” “#1 VPN Service for California,” and “Fast Servers in Los
9 Angeles” and “San Francisco.” Opp. at 3. But, as the MTD shows, this ad conveys
10 that ExpressVPN is the best service “*for remotely accessing* servers in those
11 locations,” regardless of the user’s physical location. MTD at 11-12. The point
12 conveyed in ExpressVPN’s ads is that users may access a California-based VPN (like
13 they may access VPN Servers based in dozens of other locations) from “anywhere . .
14 . in the world.” *Id.* (emphasis omitted). Plaintiffs put their own spin on short,
15 selective excerpts taken from the advertisements, arguing, for instance, that
16 ExpressVPN’s statement that it is the “#1 VPN Service for California” means that
17 ExpressVPN is the best service “for use by Californians,” Opp. at 3—but that is not
18 what the ads say, and plaintiffs cannot reconcile their reading with the ad’s focus on
19 the national and global nature of ExpressVPN’s offerings.

20 In a conclusory fashion, plaintiffs argue that, “if a company chooses to
21 advertise in a forum, that is express aiming.” Opp. at 2. But the authorities they cite
22 in support are inapposite. First, as already discussed, *see* MTD at 13, *Briskin v.*
23 *Shopify, Inc.* involved a defendant intentionally and “affirmatively reach[ing]” into a
24 device after it had learned—and therefore already knew—that the device was located

26 ¹ Plaintiffs assert that “several” other “similar ExpressVPN ads target[] California,”
27 Opp. at p. 3 (citing FAC ¶¶ 16-18), but they do not even attempt to explain how any
28 such advertisements would enable them to overcome the fatal defects in their
arguments.

1 in California and implanting tracking software into that device. 135 F.4th 739 (9th
2 Cir. 2025) (en banc). ExpressVPN’s passive, globally accessible advertising, which
3 (as shown above) lacks any non-incidental focus on California, is not remotely
4 comparable. Indeed, *Briskin* expressly upheld the Ninth Circuit’s rule that
5 “something more” than this sort of passive Internet advertising is required to establish
6 personal jurisdiction. *Briskin*, 135 F.4th at 758 n.16.²

7 Plaintiffs’ reliance on *Hidalgo v. JPMorgan Chase Bank, N.A.*, 2025 WL
8 1370488 (S.D. Cal. May 12, 2025), is likewise misplaced. Plaintiffs cite *Hidalgo* for
9 the proposition that, “under *Briskin*, ‘intentional conduct affecting a known California
10 resident suffices.’” Opp. at 2 (quoting *Hidalgo*, 2025 WL 1370488, at *4). But the
11 word “known” is more significant here than plaintiffs acknowledge. *Hidalgo*
12 involved a bank reporting inaccurate credit information about the plaintiff “*after*
13 receiving his disputes, which explicitly notified [the bank] of his location,” meaning
14 the bank was “aware[]” of the plaintiff’s California residency and thus “knew or
15 should have known that its inaccurate reporting would damage [p]laintiff’s credit in
16 California.” *Hidalgo*, 2025 WL 1370488, at *3, 5 (emphasis added). Plaintiffs allege
17 no actions taken by ExpressVPN based on, or even with knowledge of, any user’s
18 California residency.

21 ² *Rio Properties, Inc. v. Rio International Interlink*, is also inapposite, as the plaintiff
22 there “alleged that [the defendant] ‘specifically targeted consumers’ in Nevada ‘by
23 running radio and print advertisements in Las Vegas.’” 284 F.3d 1007, 1020–21 (9th
24 Cir. 2002). These ads were physically introduced and delivered into the forum, as
25 opposed to merely being globally available online. And in *Brayton Purcell LLP v.*
26 *Recordon & Recordon*, the defendant “engaged in willful copyright infringement
27 targeted at [plaintiff], which [defendant] knew to be a resident of the [f]orum.
28 Specifically, [plaintiff] alleged [defendant] individually targeted it by ‘willfully,
deliberately and knowingly’ making ‘commercial use of [plaintiff’s] [w]ebsite,’”
thereby placing [defendant] in competition with [plaintiff] in the field of elder abuse
law.” 606 F.3d 1124 (9th Cir. 2010).

1 Similarly, in *DEX Sys., Inc. v. Deutsche Post AG*, the Ninth Circuit exercised
2 specific personal jurisdiction over a defendant accused of “intentional copyright
3 infringement occurring on [plaintiff’s] California servers” where plaintiff’s “server
4 had to be engaged and used for the software at issue to function and [defendant] had
5 knowledge of this fact.” 727 F. App’x 276, 278 (9th Cir. 2018). Moreover, “that the
6 software was located on [plaintiff’s] California server was not merely a fortuitous
7 occurrence” because it “was located on California servers pursuant to an agreement
8 reached by the parties.” *Id.* Under such circumstances, where the defendant not only
9 knew the location of the target server ahead of time but also actively procured its
10 placement there, it is unsurprising that the court found “sufficient record evidence to
11 establish that [defendant’s] allegedly infringing conduct was expressly aimed at and
12 occurred in California.” *Id.* In contrast, ExpressVPN neither had foreknowledge of
13 plaintiffs’ locations nor agreed with them that they would use California-based VPN
14 Servers.

15 Finally, *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972 (9th Cir. 2021) is also
16 inapposite. There, the defendant skincare company published ads specifically
17 directed toward American consumers, such as: “ATTENTION USA BABES WE
18 NOW ACCEPT afterpay [*sic*].” *Id.* at 978. This constituted an “intentional, explicit
19 appeal to American consumers **and no others.**” *Id.* at 980 (emphasis added). As
20 shown above, when viewed in context, ExpressVPN’s advertisements did not target
21 California consumers, and certainly not at the exclusion of everyone else—rather,
22 those advertisements marketed the availability of VPN Servers in California as a
23 selling point to a **global** customer base.

24 Plaintiffs also fail to explain how ExpressVPN’s allegedly California-centric
25 advertising “caus[ed their] harm.” *Gagnon v. Ridge Instrument Co.*, 2008 WL
26 11422488, at *3 n.3 (C.D. Cal. Feb. 29, 2008); *see Schwarzenegger v. Fred Martin*
27 *Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004). To attempt to bridge the gap between
28 this advertising and the alleged harms caused by a separate, static purchase and

1 checkout webpage, plaintiffs argue that the “point of ExpressVPN’s ads was to sign
2 up California consumers for these subscriptions. . . . So the ads caused foreseeable
3 harm.” Opp. at 3. But this conclusion does not follow from its premise. Even
4 accepting, *arguendo*, that “the point of ExpressVPN’s ads was to sign up California
5 consumers,” plaintiffs fail to explain how those ads caused harm, as the *Calder* test
6 requires.

7 Plaintiffs do not allege, for instance, that they were influenced by or even saw
8 the ads before they purchased ExpressVPN’s services. *See Gagnon*, 2008 WL
9 11422488, at *3 n.3 (“Plaintiffs describe [d]efendants’ phone calls and emails to
10 California as the intentional acts at issue. The phone calls and emails did not cause
11 harm to [p]laintiffs. To the extent that [p]laintiffs were harmed, they were harmed by
12 [d]efendants’ alleged breach of the alleged oral contract.”). This case is thus unlike
13 *Brayton*, where the defendant’s conduct—copying the plaintiff’s website design—
14 bore a direct and clear relationship to the harms suffered by the plaintiff, including
15 “harm to its business reputation” and decreased profits. 606 F.3d at 1131. Here, only
16 the allegedly inadequate ARL disclosures (not ExpressVPN’s ads) could have caused
17 plaintiffs’ injuries, and plaintiffs do not (and could not) allege those signup
18 disclosures targeted or even mentioned California.

19 Plaintiffs’ other authorities only highlight the inappropriateness of exercising
20 personal jurisdiction under *Calder* here. In *Doe v. WebGroup Czech Republic, a.s.*,
21 the Ninth Circuit stated that a “defendant causes harm” in a forum under the *Calder*
22 test “when the ***bad acts that form the basis of the plaintiff’s complaint occur in that***
23 ***forum.***” 93 F.4th 442, 456 (9th Cir. 2024) (cleaned up & emphasis added), *overruled*
24 *in part on other grounds by Briskin*, 135 F.4th at 757 n.15. Even if ExpressVPN’s
25 alleged California-centric advertising could be construed as an act occurring in
26 California, plaintiffs do not explain how ExpressVPN committed a “bad act” merely
27 by marketing its services; nor do the advertisements, as opposed to ExpressVPN’s
28

1 allegedly inadequate ARL disclosures, “form the basis” of plaintiffs’ complaint and
2 their claims for relief. *Id.*

3 Ultimately, plaintiffs’ authorities concern the exercise of specific personal
4 jurisdiction in two types of fact patterns. The first is where it is the **defendant** who
5 affirmatively reaches into the forum to make unsolicited and harmful contact with the
6 plaintiff, such as by publishing print or radio ads in the forum (*Rio Properties, Inc*) or
7 reaching into the forum digitally to infringe on the copyright known to belong to a
8 resident of the forum (*DEX Sys., Inc.*). The second is where the **consumer** seeks out
9 and initiates contact with the defendant, and the defendant, fully aware of the
10 consumer’s location, targets its misconduct at that consumer—such as by installing
11 tracking software on a device the defendant knew was located in a particular forum
12 (*Briskin*) or reporting damaging credit information to credit bureaus about an
13 individual already known to be located in the forum because that individual reached
14 out and provided that information (*Hidalgo*). This case involves a distinct, third
15 scenario, wherein the alleged wrongdoing—displaying supposedly insufficient ARL
16 disclosures on a website—is not targeted at any forum and occurred simultaneously
17 with plaintiffs’ own initial outreach to ExpressVPN (*i.e.*, via their decision to visit the
18 ExpressVPN website and purchase a subscription). Simply put, ExpressVPN did not
19 direct any allegedly harmful conduct at California.

20 2. ExpressVPN’s California VPN Servers

21 Plaintiffs’ arguments predicated on ExpressVPN’s California VPN Servers
22 suffer from, among other defects, the same causation problem identified above:
23 Plaintiffs fail to explain how ExpressVPN’s purported maintenance of these VPN
24 Servers caused plaintiffs any harm or why the servers are even relevant to a *Calder*
25 analysis when the bases of plaintiffs’ claims are the allegedly inadequate ARL
26 disclosures hosted on ExpressVPN **Website Servers**, “[t]he physical location of”
27 which “is not decided by or controlled by ExpressVPN but rather by the third-party
28

1 webhosting service provider hired by ExpressVPN to host the websites such that they
2 are accessible globally.” ECF No. 26-1, Buckley Decl. ¶ 19.

3 3. ExpressVPN’s Third-Party Affiliate Marketing

4 Nor does ExpressVPN’s alleged third-party affiliate marketing with Internet
5 influencers establish *Calder* jurisdiction. As is true with respect to ExpressVPN’s
6 online advertisements, plaintiffs point to nothing in ExpressVPN’s alleged influencer
7 marketing that constitutes express aiming at California. Indeed, the only concrete
8 example plaintiffs provide is an influencer video by the YouTuber “Geekman” using
9 the phrase “Best California VPN Servers,” Opp. at 5, but as already explained, this
10 language does not target California. The alleged influencer marketing also suffers
11 from the same causation problem as plaintiffs’ alleged “ExpressVPN advertising” and
12 “VPN Server” “buckets of intentional acts”: Even if plaintiffs could somehow
13 attribute the conduct of third-party affiliates to ExpressVPN (they cannot), plaintiffs
14 simply do not allege that the harm they suffered was caused by anything a third-party
15 affiliate said or did.

16 Furthermore, plaintiffs fail to allege that ExpressVPN exercised any editorial
17 control over any location-specific (or even other) content of the influencers’
18 advertisements; thus, to the extent any influencer statements could be deemed to target
19 California, such statements cannot be imputed to ExpressVPN. *See L.A. Turf Club,*
20 *Inc. v. US Racing*, 2025 WL 2019948, at *3 (C.D. Cal. May 15, 2025) (“unilateral
21 activity of . . . a third party” is insufficient to connect a defendant to the forum state).
22 Indeed, as ExpressVPN explains, “[t]o the extent, if any, that a third-party affiliate
23 discusses or ‘targets’ a particular geographic location, such third-party affiliate is
24 acting unilaterally in doing so.” Declaration of Jack Buckley ¶ 5 (Nov. 20, 2025). At
25 most, plaintiffs allege that ExpressVPN “reserves the right to view and approve”
26 influencer content, Opp. at 5, but they do not allege that ExpressVPN actually
27 exercised this right or reviewed any of the alleged influencer content at issue here.
28 Plaintiffs’ reliance on *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218 (9th

1 Cir. 2011), is misplaced, as that case involved the defendant allegedly posting
2 copyright-infringing content on its *own* website, so the “unilateral activity” doctrine
3 did not pose an obstacle to jurisdiction—unlike here, and fatally so. *Id.* at 1221-23.

4 Or, as the YouTuber Geekman himself puts it: “I am affiliated, but not
5 sponsored by any VPN provider. This means I might make money when you purchase
6 paid services through the links provided and I might be able to offer discounts when
7 available. Not being sponsored allows me to keep my own opinions and provide
8 reviews and tutorials without bias. So, if you enjoyed the content consider using my
9 affiliate links. All of my opinions on this channel are always my own!” Geekman,
10 *Best California VPN Server – Get a California IP*, YouTube (Sept. 28, 2021),
11 www.youtube.com/watch?v=IFYdhYjo7QQ (video description).

12 **II. PLAINTIFFS FAIL TO ESTABLISH STATUTORY STANDING**

13 Because plaintiffs do not dispute that they received exactly what they paid for
14 when they signed up for ExpressVPN, they cannot establish the requisite loss of
15 “money or property” for their UCL or FAL claims or “damage” under the CLRA. As
16 the California Supreme Court observed in *Kwikset Corp. v. Superior Court*, a
17 consumer has standing under California’s consumer protection laws where he
18 “value[s] what [he] actually received less” than “the money [he] parted with” or less
19 than the product or service as it was advertised. 246 P.3d 877, 892 (Cal. 2011). There,
20 the plaintiffs purchased locks falsely advertised as having been made in America, and
21 the plaintiffs valued the foreign-made locks they received instead less than ones made
22 in America. *Id.* Conversely, when Millar purchased one month of ExpressVPN’s
23 services for \$12.95, *see* FAC ¶ 40, he demonstrated that he valued one month of VPN
24 services as worth at least \$12.95. Thus, although Millar incurred allegedly unwanted
25 renewal charges thereafter, he always received services in exchange that were worth
26 at least as much as the money he spent. The same holds true for Martinez’s purchase
27 of a yearly plan. *See* FAC ¶ 56.

1 Although plaintiffs do not dispute that the services they received were worth at
2 least as much as they cost, plaintiffs insist that they would not have chosen to enter
3 into their purchases had they known of the automatically renewing nature of the VPN
4 subscriptions. Opp. at 8. Putting aside the credibility of this statement, plaintiffs’
5 mere regret of having made these purchases cannot establish statutory standing when
6 they cannot point to anything of material value that they lost. The mere fact that
7 “money has changed hands” is insufficient. *Roz v. Nestle Waters N. Am., Inc.*, 2017
8 WL 132853, at *7 (C.D. Cal. Jan. 11, 2017). Plaintiffs’ reliance on *Mayron v. Google*
9 *LLC*, 269 Cal. Rptr. 3d 86, 88, 91 (Ct. App. 2020) on this issue is misplaced. There,
10 the court **affirmed dismissal** of a complaint for lack of statutory standing, finding the
11 plaintiff failed to allege that he would not have purchased services from Google had
12 proper automatic-renewal disclosures been provided. *Id.* The court held that such an
13 allegation was **necessary** to establish statutory standing, but it had no occasion to
14 consider whether it would have been **sufficient** to establish standing if made. Thus,
15 *Mayron* sets forth only nonbinding dicta at most.

16 Plaintiffs attempt to distinguish *Warner* on the basis that the plaintiff there “did
17 ‘not allege that he did not want’ the product,” Opp. at 9 (quoting *Warner*, 105 F. Supp.
18 3d at 1094), whereas plaintiffs have alleged that they did not “expect, want, or consent
19 to automatic renewal,” FAC ¶¶53, 56. But plaintiffs’ quotation from *Warner* cuts out
20 the critical language “**(at any price)**”—that is, when the quoted sentence is instead
21 read in full, it states: “Warner does not allege that he did not want Tinder Plus **(at**
22 **any price)**, that Tinder Plus was unsatisfactory, or that Tinder Plus was worth less
23 than what he paid for it.” 105 F. Supp. 3d at 1095 (emphasis added). In other words,
24 an injury sufficient for statutory standing may well exist where a plaintiff pays
25 **something** for a product or service that the plaintiff considers to be worth **nothing** or
26 at least **less than** the amount paid—but there can be no statutory injury where
27 equivalent (or greater) value is received in exchange for payment. Accordingly, the
28 court in *Warner* found that the allegation that the subscription “fee was auto-debited

1 despite the fact that [the plaintiff] had not authorized defendant to continue charging
2 him”—the same allegation plaintiffs make here—does not suffice, as it does not
3 impact the fundamental value proposition of the transaction. *Id.* at 1088.

4 Nor is *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1101 (9th Cir. 2013) on point.
5 There, the plaintiff purchased products that were falsely advertised as having sold at
6 a higher price in the past, misleading consumers into believing the products had a
7 higher monetary value than they really did. *Id.* Again, though, plaintiffs here do not
8 argue that a month or year of ExpressVPN service is worth less than what they paid.
9 Plaintiffs also rely on a series of non-binding district court decisions that they contend
10 establish that their mere allegation that they would not have purchased ExpressVPN
11 had they known of the automatic-renewal policies is sufficient to establish standing.
12 Opp. at 8-9. These decisions are not persuasive here because none meaningfully
13 explains what material value a plaintiff could conceivably be said to lose when he
14 allegedly unwittingly subscribes to a service that bills him on a recurring basis for an
15 amount that is less than or equal to the value of the service received.³

16 **III. PLAINTIFFS FAIL TO ESTABLISH EQUITABLE JURISDICTION**

17 Plaintiffs do not dispute that they seek the same amount of money in restitution
18 and damages. MTD at 17-18. That establishes that the Court lacks equitable
19 jurisdiction, for a plaintiff “cannot seek restitution . . . for the same money he would
20 receive for his claims at law.” *Smart v. Nat’l Collegiate Athletic Ass’n*, 2023 WL
21 4827366, at *11 (E.D. Cal. July 27, 2023); *Sonner v. Premier Nutrition Corp.*, 971
22 F.3d 834, 844 (9th Cir. 2020) (dismissal of equitable claim warranted where plaintiff
23 failed to “explain how the same amount of money for the exact same harm is
24 inadequate or incomplete”). Plaintiffs’ only argument to the contrary is that their
25 CLRA claim contains “more stringent elements” than their equitable claims. Opp. at

26
27 ³ Plaintiffs concede that they do not attempt to establish standing under the ARL’s
28 “unconditional gift” provision. Opp. at 9-10. And indeed, they cannot. MTD at 16-17.

1 10 (citation omitted). In other words, plaintiffs’ argument is that their legal remedies
2 are “inadequate” because their legal claims face greater obstacles on the merits.

3 In so arguing, plaintiffs misstate the law. The adequacy of a legal remedy does
4 not turn on the probability of success of the underlying legal claim but whether the
5 *remedy, if attained*, would suffice to make the plaintiff whole. *See Nacarino v.*
6 *Chobani, LLC*, 2021 WL 3487117, at *12 (N.D. Cal. Aug. 9, 2021). The question is
7 whether there is some “inherent limitation” on the remedy itself, not how likely the
8 plaintiff is to secure that remedy. *Id.* Thus, a legal remedy is not “inadequate” where
9 the plaintiff’s “inability to obtain damages” would merely result from the claim’s
10 “failure on the merits.” *Id.* (rejecting argument that CLRA’s legal remedies were
11 inadequate merely because CLRA was “rooted in a different theory of liability” than
12 equitable claims); *accord Roffman v. Rebbl, Inc.*, 2024 WL 4996063, at *1 (N.D. Cal.
13 Dec. 4, 2024) (rejecting a similar argument and dismissing equitable claims under the
14 UCL and FAL); *see also Key v. Qualcomm Inc.*, 129 F.4th 1129, 1142 (9th Cir. 2025)
15 (plaintiffs’ “failure to prove” their legal claim “does not make that remedy
16 inadequate” (citation omitted)); *Guzman v. Polaris Indus.*, 49 F.4th 1308, 1313 (9th
17 Cir. 2022) (adequate legal remedy existed even though legal claim was time-barred).⁴

18 **IV. MILLAR REMAINS BOUND TO ARBITRATE**

19 If the Court concludes it has jurisdiction over this matter, it should compel
20 arbitration and stay the matter as to Millar.

21 **A. Millar Demonstrably Consented to Arbitration**

22 When Millar subscribed to ExpressVPN’s service, ExpressVPN provided clear,
23 conspicuous notice that doing so required him to agree to ExpressVPN’s TOS, and
24

25 ⁴ Plaintiffs’ citation to the nearly 90-year-old case, *American Life Insurance Co. v.*
26 *Stewart*, 300 U.S. 203 (1937) does not help them either. That case involved insurance
27 policies that became incontestable after a set period, depriving the insurer of any
28 “remedy at law at all except at the pleasure of an adversary.” *Id.* at 215. Plaintiffs do
not argue they have no “remedy at law at all” but merely that their legal claims are
more difficult to prove.

1 Millar affirmatively clicked the “Join Now” button signifying his unambiguous assent
2 to that agreement, including its arbitration provision. *See* ECF No. 26-1, Buckley
3 Decl. ¶ 12. A binding arbitration agreement was therefore formed. In this litigation,
4 however, Millar now wants to go back on his agreement to arbitrate any dispute. In
5 an attempt to provide himself cover to do so, Millar overcomplicates what is a
6 remarkably straightforward analysis: Whether, taking into account the totality of “the
7 visual design of the webpages and the context of the transaction,” “a reasonably
8 prudent internet user would have seen” the “[n]otice of terms and conditions,”⁵ and
9 whether he took “some action, such as clicking a button or checking a box, that
10 unambiguously manifests his . . . assent to those terms.”⁶ The answer to both of these
11 questions here is yes.

12 ***First***, the visual design of ExpressVPN’s website places the TOS disclosure—
13 “By submitting this form, you agree to our [Terms of Service](#)”—against a white
14 background, in a font size used throughout the page, located right below and next to
15 the “Join Now” action button, and with the words “[Terms of Service](#)” brightly
16 colored, underlined, capitalized, and obviously hyperlinked. *Opp.* at 18. Critical
17 differences exist between the ExpressVPN TOS notice and the TOS notices that were
18 found inadequate to unambiguously bind users in the cases cited by plaintiffs:

19 • In *Chabolla v. ClassPass Inc.*, the “Continue” button was separated from
20 the TOS notice by the combination of: (i) white space, (ii) a distinct blue “Sign Up
21 with Facebook” button that is bigger than the diminutive TOS notice itself, and (iii) a
22 stylized “—or—.” 129 F.4th 1147, 1157 (9th Cir. 2025). On the other hand,
23 ExpressVPN’s TOS notice is much closer to and located between the “Join Now”
24 button and additional interactive payment option fields (which dynamically expand
25

26 ⁵ *So v. Hyatt Corp.*, No. 2:25-CV-1298-AB-SSC, 2025 WL 2994995, at *5 (C.D.
27 Cal. Aug. 25, 2025).

28 ⁶ *Berman*, 30 F.4th 849, 856 (9th Cir. 2022).

1 when clicked)—with enough white space as to be readily identifiable but not so much
2 as to be distant from the action button—making this area of the screen with the TOS
3 notice part of the “user’s natural flow.” *Id.*

4 Using *Chabolla*, plaintiffs also argue that there is a mismatch between the
5 language of ExpressVPN’s “**Join Now**” action button and the TOS notice language
6 “**By submitting this form**, you agree to our Terms of Service”—that is, because the
7 verb “join” is different from the verb “submit,” a supposedly reasonable user could
8 not discern that clicking “Join Now” constitutes “submitting this form.” Opp. at 20-
9 21. But even accepting this dubious premise,⁷ *Chabolla* tellingly involved a multi-
10 step, multi-webpage sign-up process, thereby obfuscating which of the various action
11 buttons on each page, if any, would actually bind the user to the TOS—leaving the
12 user guessing and unsure. No such ambiguity exists here, where ExpressVPN’s
13 checkout flow consists of a single, streamlined webpage with a single, conclusive
14 action button. See Opp. at 18.

15 • In *Shultz v. TTAC Publ’g, LLC*, the court found that “the webpage design
16 makes it exceedingly difficult to discern the significance of the hyperlink,” because:
17 (i) “[t]he phrase ‘I agree to the terms and conditions’ is in very small text, and is
18 dwarfed by the large and colorful green ‘Complete Purchase’ button below it;” (ii)
19 “[a]lthough the hyperlink to the Terms and Conditions is in light blue, it is not
20 underlined, highlighted, in all caps, or otherwise set off from the page;” (iii) “[t]he
21 checkout page also has what appears to be a promotional video playing in the top left
22 corner of the webpage, and the volume appears to be at its maximum level;” and (iv)
23 “[t]o the right of the terms and conditions hyperlink and ‘Complete Purchase’ button
24 is further promotional material about the soon-to-be-purchased product.” 2020 U.S.

25
26 ⁷ But see *Chabolla*, 129 F.4th at 1159 (“[I]n *Patrick*, clicking a ‘**Place Order**’ button
27 unambiguously manifested assent because the website explained that ‘by **submitting**
28 an order, the consumer ‘confirms [he] . . . agree[s] to our privacy policy and terms of
use.’” (emphases added)).

1 Dist. LEXIS 198834 at *4 (N.D. Cal. Oct. 26, 2020). None of these factors applies
2 here, as ExpressVPN’s checkout page design was different in every material respect.

3 • In *Serrano v. Open Rd. Delivery Holdings, Inc.*, the TOS link was in the
4 same font, size, and gray color as the surrounding text—the only difference being that
5 the link was underlined (but also in gray). The court found “the failure to identify the
6 hyperlink to [d]efendant’s Terms of Use by more than mere underlining [was] highly
7 significant.”⁸ 666 F. Supp. 3d 1089, 1096 (C.D. Cal. 2023). In contrast,
8 ExpressVPN’s TOS link is, as *Serrano* counsels, in “a contrasting font color . . . ,
9 which can alert a user that the particular text differs from other plain text in that it
10 provides a clickable pathway to another webpage.” *Id.* at *1097.

11 • In *Farmer v. Barkbox, Inc.*, the “lone [TOS] notice [was] printed small,
12 light-colored font at the bottom of a page crowded with other graphics and text more
13 likely to attract the user’s attention,” especially to the left side of the screen—away
14 from the TOS notice on the right side—and including colorful images of a dog and
15 stuffed animals. 2023 U.S. Dist. LEXIS 222435 at *6 (C.D. Cal. Oct. 6, 2023).
16 ExpressVPN’s TOS notice appears on the left side of the screen, which is the same
17 side to which the eyes are drawn, as that is also where the mandatory accordion
18 payment fields and “Join Now” action button are located.

19 ***Second***, in the context of today’s modern era dominated by e-commerce and
20 the proliferation of subscription services, the average consumer is more aware than
21 ever of the ubiquitous presence of binding terms of service on every website. It
22 therefore strains credulity to think that Millar—or anyone—could buy something
23 online, especially a subscription service, and somehow believe that no formal
24

25 ⁸ And, in all events, Millar alleges his purported injury occurred ***while his arbitration***
26 ***agreement was in place***. Compare FAC at ¶ 4 (alleging charges in September and
27 October 2022), *with* Opp. at 25-26 (alleging he agreed to the new terms only ***after***
28 those charges, when he cancelled his subscription). Thus, even were this an issue for
the Court (it is not), Millar’s argument is without merit.

1 contractual terms govern the transaction and the relationship between the consumer
2 and the online service provider. Where, as here, “it is undisputed the program's
3 purpose is ongoing,” and it “is undisputed [each plaintiff] underwent a full registration
4 process to sign up,” including having, for instance, “entered his name, email address,
5 physical address, preferred language, and customer type; . . . then created a password
6 for his . . . account; . . . and finally clicked the ‘JOIN NOW’ button to complete his
7 registration,” a reasonable consumer would understand that the transaction
8 “contemplate[s] a continuing relationship,” with respect to which “courts are more
9 inclined to enforce hyperlinked agreements.” *So v. Hyatt Corp.*, 2025 WL 2994995,
10 at *5. The Court should do the same here.

11 **B. Millar Further Agreed to Delegate Arbitrability Disputes**

12 “Under federal law, the incorporation of a particular set of arbitration rules—
13 such as the ICDR rules—that provide for the arbitrator to decide questions of
14 arbitrability ‘constitutes clear and unmistakable evidence that the contracting parties
15 agreed to arbitrate arbitrability.’” *ASUS Computer Int’l v. InterDigital, Inc.*, 2015 WL
16 5186462, at *3 (N.D. Cal. Sept. 4, 2015) (citation omitted). Contrary to Millar’s
17 contention, “the majority of courts have concluded that” this rule indeed “applies
18 equally to sophisticated and unsophisticated parties.” *Rendon v. T-Mobile USA, Inc.*,
19 747 F. Supp. 3d 1314, 1319–20 (C.D. Cal. 2024), *reconsideration denied*, 2024 WL
20 5256491 (C.D. Cal. Nov. 4, 2024); *see also, e.g., Acosta v. Brave Quest Corp.*, 733
21 F. Supp. 3d 920, 928 (C.D. Cal. 2024) (“In the end, this Court agrees with those courts
22 that have extended [this rule] to parties of all gradations of sophistication.”). The
23 same result should follow here.

24 Seemingly recognizing this, Millar attempts to bootstrap his unconscionability
25 challenges into attacks on the separate delegation of arbitrability agreement. Opp. at
26 23-24. However, Millar’s contention that the chosen forum for the arbitration renders
27 it unconscionable (*id.* at 22-24) “is not ‘specific to the delegation provision’” and thus
28 “[w]hether the forum selection clause is enforceable as to the contract as a whole is

1 for the arbitrator to decide.” *Gountoumas v. Giaran, Inc.*, 2018 WL 6930761, at *11
2 (C.D. Cal. Nov. 21, 2018) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 73
3 (2010)). The same is true of Millar’s argument that ExpressVPN purportedly
4 “waived” its right to arbitrate by updating its online terms to remove the arbitration
5 provision, Opp. at 25-26—this is not an issue of “waiver,” but instead a dispute about
6 the scope and enforceability of the arbitration agreement, which is plainly delegated
7 to the arbitrator. *ASUS Computer Int’l*, 2015 WL 5186462 at *4 (recognizing the
8 ICDR rules delegate to the arbitrator disputes concerning the “scope or validity of the
9 arbitration agreement”).

10 Millar’s remaining “unconscionability” arguments depend on a
11 misunderstanding of the AAA-ICDR rules. He contends the rules would impose a
12 “\$1,450 filing fee,” a “\$1,150” “Final Fee,” and “\$1,000 an hour” arbitrator fees that
13 render arbitration of any dispute prohibitively expensive. Opp. at 21-22 (internal
14 quotation marks omitted). However, the ICDR is just the international branch of the
15 AAA.⁹ Accordingly, the AAA Consumer Arbitration Rules—which are “deemed” to
16 be part of *any* arbitration agreement where the parties “have provided for arbitration
17 by the American Arbitration Association,” as here—apply,¹⁰ including their
18 incorporation of the consumer arbitration fee schedule, which requires only a \$225
19 filing fee (less than the court fees Millar already chose to incur here) and otherwise
20 allocates the costs of arbitration to the business.¹¹ Accordingly, Millar’s arguments
21 as to fees are entirely misplaced, and to the extent he contends the arbitration
22

23
24 ⁹ ICDR, *About ICDR*, www.icdr.org/about_icdr (“The ICDR®—International
25 Centre for Dispute Resolution®—is the international division of the largest arbitral
institution in the world, the American Arbitration Association.”).

26 ¹⁰ AAA, *Consumer Arbitration Rule R-1*, [www.adr.org/media/yawntdvs/2025
consumer_arbitration_rules.pdf](http://www.adr.org/media/yawntdvs/2025_consumer_arbitration_rules.pdf).

27 ¹¹ AAA, *Consumer Mediation Fee Schedule*, [www.adr.org/media/3uofn4lu/
28 consumer_rules_and_mediation_procedures_feeschedule.pdf](http://www.adr.org/media/3uofn4lu/consumer_rules_and_mediation_procedures_feeschedule.pdf).

1 agreement for some reason overrides this consumer-favorable fee allocation, that is
2 an issue for the arbitrator to address.

3 **V. PLAINTIFFS DO NOT ADEQUATELY ALLEGE THEIR CLAIMS**

4 **A. Plaintiffs’ Fraud Claims Fail the Reasonable Consumer Test**

5 Because ExpressVPN repeatedly, explicitly, and visibly disclosed its
6 automatic-renewal policies, plaintiffs cannot show that “members of the public are
7 likely to be deceived” by ExpressVPN’s practices. *Rutter v. Apple Inc.*, 2022 WL
8 1443336, at *8 (N.D. Cal. May 6, 2022) (citation omitted). This included
9 ExpressVPN’s use of language on the order page that makes the recurring nature of
10 its subscriptions blatantly obvious—for example, “1 Month . . . \$12.95 *per month* . .
11 . *Billed every month*,” “12 Months, \$8.32 *per month* . . . *Billed every 12 months*,”
12 and “ExpressVPN 1-month plan, *billed monthly* (\$12.95/month).” Opp. at 18
13 (emphases added). No reasonable consumer would fail to understand that they were
14 purchasing a renewing subscription service.

15 Nevertheless, plaintiffs argue that ExpressVPN violated the ARL, and that
16 plaintiffs therefore presumptively satisfy the “reasonable consumer” test. Opp. at 11.
17 They also argue that whether the reasonable consumer test has been satisfied is a
18 question of fact. *Id.* But even assuming, *arguendo*, that plaintiffs were correct in
19 arguing that ExpressVPN violated the ARL, the presumption they identify is
20 rebuttable—including at the pleading stage. Where a court may “conclude as a matter
21 of law that members of the public are not likely to be deceived, dismissal is
22 appropriate.” *Warner*, 105 F. Supp. 3d at 1092 (cleaned up); *Freeman v. Time, Inc.*,
23 68 F.3d 285, 289 (9th Cir. 1995) (affirming dismissal of CLRA claim where
24 “promotions expressly and repeatedly state the conditions which must be met in order
25 to win” and the language was not “hidden or unreadably small” and “appear[ed]
26 immediately next to the representations it qualifies,” such that a “person of ordinary
27 intelligence” would not be misled (internal quotation marks omitted)). Plaintiffs hide
28 behind their presumption and do not meaningfully engage with the disclosures

1 themselves—which lead to the inescapable conclusion that a reasonable consumer
2 would not be misled.

3 **B. Plaintiffs Fail to State a Violation of the ARL**

4 In their Opposition, plaintiffs tellingly fail to identify or otherwise detail any
5 specific ARL provision that ExpressVPN allegedly violated, relying instead on the
6 conclusory assertion that they “plausible plead” that ExpressVPN “violates the ARL
7 in nearly every way.” *See* Opp. at 10-12. But a closer look at the FAC reveals that
8 this is not the case.

9 For instance, plaintiffs complain that ExpressVPN did not supply a “clear and
10 conspicuous” disclosure of its ARL policies. FAC ¶ 45 (quoting Cal. Bus. & Prof.
11 Code § 17601(3)). But those policies are contained in the TOS hyperlink that is in
12 green, underlined, and easily seen against the checkout flow’s white background. *Id.*
13 ¶ 43; *see* Cal. Bus. & Prof. Code § 17601(3) (disclosure may be “in contrasting type,
14 font, *or* color to the surrounding text of the same size” (emphasis added)).

15 Plaintiffs also complain that ExpressVPN “fails to disclose ‘that the amount of
16 the charge will change, *if that is the case*, and the amount to which the charge will
17 change, if known.’” *Id.* ¶ 46 (quoting Cal. Bus. & Prof. Code § 17601(a)(2)(C))
18 (emphasis added). But plaintiffs do not even allege that ExpressVPN’s fees were
19 subject to change when they signed up (*e.g.*, a promotional price in the first period
20 and a different price in the renewal period). If they weren’t, then there was nothing
21 to disclose.

22 Plaintiffs further complain that “ExpressVPN fails to require the user to press
23 a button confirming that the user is consenting to automatic renewal.” *Id.* ¶ 47. But
24 the checkout flow’s statement that, “[b]y submitting this form, you agree” to the
25 hyperlinked TOS, which set forth the automatic-renewal policies, plainly puts a
26 reasonable consumer on notice that they are consenting to automatic renewal by
27 clicking “Join Now.” *Id.* ¶ 43. Plaintiffs similarly complain that ExpressVPN fails
28 to disclose “that the subscription will continue until the consumer cancels and fail[s]

1 to include a description of the cancellation policy.” *Id.* ¶ 48. But this information,
2 too, is all set forth in the TOS that is hyperlinked within the checkout flow. ECF No.
3 26-2.

4 Finally, plaintiffs contend that ExpressVPN’s purchase acknowledgements fail
5 to state that “charges will automatically recur until the consumer cancels” or provide
6 information about the “cancellation policy.” FAC ¶ 50. But all the ARL requires is
7 that the acknowledgment provide this information “in a manner that is capable of
8 being retained by the consumer.” Cal. Bus. & Prof. Code § 17602(a)(3). Plaintiffs
9 provide an acknowledgment email that Millar alleges he received from ExpressVPN
10 after making his purchase, and that acknowledgment plainly contains a hyperlink to
11 ExpressVPN’s website, where all the information plaintiffs complain is absent may
12 be found and was available at all relevant times. FAC ¶ 49. Thus, the
13 acknowledgment email adequately incorporated all relevant information in a manner
14 that is “capable of being retained by the consumer.”

15 **C. Plaintiffs’ Other Claims Merely Repackage Their Fraud Claims**

16 Plaintiffs do not dispute that their claims under the UCL’s “unlawful” and
17 “unfair” prongs “merely repackage the same underlying conduct, sounding in fraud,
18 for which [they] sued under the ‘Deceptive’ prong.” MTD at 21. Plaintiffs instead
19 argue that “the reasonable consumer test does not apply” to claims under the UCL’s
20 “unlawful” prong—but, in so arguing, they completely ignore *Eidmann v. Walgreen*
21 *Co.*, which specifically held that a claim under the UCL’s “unlawful” (or “unfair”)
22 prong may not survive when it rests on the same underlying conduct found inadequate
23 to support a claim arising in fraud. 522 F. Supp. 3d 634, 647 (N.D. Cal. 2021).

24 Plaintiffs cite the unpublished *Bruton v. Gerber Products Co.*, 703 F. App’x
25 468 (9th Cir. 2017), but that decision did not involve the ARL and is neither binding
26 nor persuasive. The court opined that “[t]he best reading of California precedent is
27 that the reasonable consumer test is a requirement under the UCL’s unlawful prong
28 only when it is an element of the predicate violation.” *Id.* at 471-72. But neither of

1 the two intermediate appellate court cases *Bruton* cited with respect to this proposition
2 considered whether a claim under the “unlawful” (or “unfair”) prong of the UCL may
3 be maintained when the underlying conduct arises in fraud, as here, and the reasonable
4 consumer test is not satisfied, also as here. *See id.* It would undermine the UCL’s
5 statutory scheme and the purposes of the reasonable consumer test to permit plaintiffs
6 to use the “unlawful” (and/or “unfair”) prong merely to skirt the application of the
7 reasonable consumer test to alleged conduct that they do not dispute fundamentally
8 sounds in fraud.

9 **CONCLUSION**

10 For the foregoing reasons, the Court should dismiss these proceedings for lack
11 of jurisdiction and, in the alternative, compel Millar’s claims to arbitration.

12 DATED: November 21, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Express Technologies, Ltd., certifies that this brief complies with the 7,000 word limit of L.R. 11-6.1 because it contains 6,833 words (including headings, footnotes, and quotations but excluding the caption, the table of contents, the table of authorities, the signature block, this certification, and any indices and exhibits).

DATED: November 21, 2025

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